

P. Cap. John Gordon

[100]

August 5. 1766.

6th Aug. 1766

[TEND CAUSE.]

Unto the Right Honourable the Lords of Council and Session, Commissioners for Plantation of Kirks and Valuation of Teinds.

THE

PETITION

Captain JOHN GORDON of Park,

Humbly Sheweth,

THAT the parish of Fordyce, in the county of Banff, being a very large parish, about the year 1600 a part of it was disjoined and erected into a separate parish, under the name of Ordiquhill.

That this parish of Ordiquhill is of small extent, and consequently in those days the teinds were of little value; and accordingly it appears that, till the year 1650, the stipend payable to the minister of Ordiquhill, vicarage included, was only 370 merks; but about that period an addition was made to it of 50 merks yearly.

That

That this stipend continued to be paid from the fore-
 said period downwards to the year 1717; and, tho'
 there was no decret, but only use of payment, it was lo-
 called so that the Earl of *Findlater*, the patron, in virtue
 of an agreement with the petitioner's predecessor, paid
 100 merks yearly; the petitioner's predecessors, pro-
 prietors of the barony of *Park*, paid 200 merks yearly;
 and the remaining 120 merks was made up by the vi-
 carage of the parish.

It appears, that in the year 1717 a demand was made
 by the presbytery of *Fordyce* for a further augmentation
 to this stipend, and accordingly it appears, that the Earl
 of *Findlater*, his son Lord *Deskford*, and Sir *James Gordon*
 of *Park* agreed, at the request of the presbytery, to
 augment the stipend to 500 merks yearly; and this
 augmentation was so localled, that of the additional
 stipend L. 24: 3: 4 *Scots* fell upon the Earl of *Findla-*
ter, which, joined to the 100 merks payable formerly
 by the Earl, made his part of the stipend amount to
 L. 90: 16: 8 *Scots*: Sir *James Gordon's* proportion of
 the new augmented stipend was L. 29: 3: 4 *Scots*,
 which, joined to the 300 merks paid by him former-
 ly, made his yearly proportion of the said stipend amount
 to L. 162: 10 *Scots*: And these two sums, with the vica-
 rage of the parish, valued as formerly at L. 80 *Scots*, or
 120 merks, made up the new stipend of 500 merks.

Aug. 20. 1717. That, upon occasion of this agreement, a contract
 was entered into between the Earl of *Findlater* and his
 son Lord *Deskford* and Sir *James Gordon* of *Park* on the one
 hand, and the moderator and whole presbytery of *Fordyce*
 on the other hand. By this contract the heretors bind
 themselves to pay the augmented sum as above, in the
 respective proportions above-mentioned, at two terms
 in

in the year, *Whitsunday* and *Martinas*; And, on the other hand, the moderator and presbytery agree that the stipend so augmented is “ a competent and sufficient stipend and provision to a minister serving the cure at the said church in time coming, considering the conveniencies of living, the remoteness of the place, the paucity of catechizable persons within the parish, and the smallness and uncertainty of the rent thereof.”

And the contract further declares, “ That the same shall remain and continue as a constant, localled, and modified stipend to the ministers of the said parish in all time coming. And they do will and consent, that the said *James Earl of Findlater and Seafield*, *James Lord Deskford*, and *Sir James Gordon of Park*, and their forefathers, shall procure and obtain from the said Lords of Council and Session an ratification and homologation of this present contract; and do bind and oblige them, and their successors in office, that they shall give their full concurrence and assistance to the procuring and obtaining of the said ratification.”

It is admitted, that no decret of modification and locality was obtained in pursuance of the foresaid contract; but, ever since the date of the agreement, the minister of *Ordiquhill* has received the stipend, fixed by the contract, from the *Earl of Findlater*, and the proprietor of the barony of *Park*, in the proportions as above ascertained; and with this stipend the minister till lately has been satisfied.

That, of late, *Mr Robert Ogilvy* the present incumbent of *Ordiquhill* brought an action of augmentation, modification, and locality, before your Lordships, as Commissioners

missioners for plantation of kirks and valuation of tythes. In this action he called as defenders the Earl of Findlater, and the petitioner as proprietor of the barony of Park. The summons sets forth, That the charge was extensive, and the expence of living high, on account of its vicinity to the town of Banff: And it further sets forth, That the rent of the barony of Park, stock and teind, amounts to L. 600 *Sterling* yearly: And concludes for an augmentation suitable to the charge, and to the teind of such a rent.

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That in this action, compareance was made for the Earl of Findlater, who seems to have admitted that the incumbent should have some augmentation; and it appears, that, at the first calling, the Earl's procurator made this admission for his Lordship, but took the summons to see till the next calling for the other heretors. And the cause being again inrolled before your Lordships, the pursuer insisted for his augmentation, when the petitioner stated certain reasons against it; and particularly observed, that the rent of the barony of Park, was libelled by far too high. Your Lordships, how-

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ever, of this date, were pleased to pronounce the following interlocutor: "The Lords having advised the libel and foregoing debate, they repel the defences, in respect of the answers, hold the defenders as confessed on the rental libelled; and modify, decern, and ordain the constant stipend and provision of the kirk and parish of *Ordiquhill*, to be, for this instant crop and year of God 1766, and yearly thereafter, in all time coming, two chalders of meal, two chalders of bear, 500 merks of money for stipend, with L. 30 money foresaid, for furnishing the communion-elements; and decern and ordain the same to be paid

“ paid yearly to the pursuer and his successors in office, ministers serving the cure at the said kirk, by Captain *John Gordon of Park*, and his successors in the right of the lands and teinds within the said parish, out of the first and readiest of the teinds, parsonage, and vicarage of the same ; beginning the first year’s payment thereof, for this instant crop and year of God 1766, and so forth yearly thereafter, in all time coming, at the terms of payment following, viz. the money at *Whitsunday* and *Martinmas* yearly, by equal portions, and the victual betwixt *Yule* and *Candlemas* yearly, after the separation of the crop from the ground.”

The petitioner must humbly beg leave to submit this judgment to your Lordships review, and he is hopeful, upon a full state of the circumstances, your Lordships, in some particulars at least, will vary the judgment.

And, in the *first* place, the petitioner must submit to your Lordships, whether any augmentation at all ought to be granted in this case. It is very true, the stipend is small, but in fact the charge is not extensive, and the expence of living in that part of the country is very moderate. The pursuer was pleased to state matters in a different light to your Lordships, That the parish was large and the expence of living high : But the petitioner’s state of the case is supported by the contract above recited, which gives a very just description of the circumstances of the parish.

Again, the petitioner must submit to your Lordships, whether, in point of law, the augmentation in this case ought not to be refused. The petitioner is advised, it is a rule uniformly followed by your Lord-

ships, That wherever a decret of modification has been obtained since 1707, your Lordships refuse to open the decree and grant a further augmentation. The petitioner admits, that there is no decret of modification in this case; but he humbly apprehends, the contract above recited is equivalent to a decret of augmentation, and ought to have the same effect in this case. It augments and ascertains the stipend; and the moderator and presbytery, who were parties to the contract, agree, That a decree of modification be obtained in conformity to it. If such a decree had been obtained, doubtless it would have fallen under the rule established by your Lordships, and this augmentation must have been refused. And, with great submission, the petitioner can see no good reason in law, why the contract of itself should not have the same effect.

And, in material justice, the petitioner's plea is certainly well founded. The stipend ascertained by the contract in 1717, was probably, at that time, as much as the teinds of the parish could afford. If the petitioner's predecessor had then brought a valuation of his teinds, the incumbent could have had no claim for an augmentation; and it is not to be doubted but the petitioner's predecessors would have brought a valuation, had it not been relying on the foresaid contract; which, on that account, ought in justice to be supported.

But in the *second* place, Supposing your Lordships still inclineable to grant an augmentation, the petitioner apprehends, the stipend will not be modified so high as it is in your Lordships interlocutor. The interlocutor was pronounced in the view that the rent of the barony of *Park*, the only lands in the parish, amounted to *L. 600 Sterling* yearly, as the minister averred; where-

as

as the rent of the barony of *Park*, independent of the Mains, which some time ago was let only for *L. 20 Sterling*; and the mills which pay no teind, amounts only to *L. 3491 : 15 : 11 Scots*, in money-rent; 12 bolls, two firlots, and two pecks meal, 23 bolls; and one peck bear; and 129 bolls, three firlots, two pecks oats; which altogether, is far short of the rent supposed by your Lordships when you granted the augmentation; and consequently, the stipend modified by the interlocutor ought to undergo a proportional diminution.

3th, By your Lordships judgment, the stipend of *Ordiquhill*, for this year and all subsequent years, is modified to "two chalders of meal, two chalders of bear, 500 merks Scots of money, with *L. 30* money fore-said for furnishing the communion-elements." Whatever may be your Lordships opinion, either as to the augmentation itself, or the amount of it, the petitioner does humbly apprehend, that it cannot be made payable in the kinds fixed by the interlocutor. From the rental above narrated, your Lordships will observe, that there is not so much meal or so much bear, payable out of the petitioner's whole estate, as would answer the stipend, was it to remain as presently fixed; and the small quantity of meal and bear that is payable, cannot serve the consumpt of the petitioner's own family. With great submission, therefore, the petitioner expects that whatever stipend may be finally modified, will be made payable in money, which is more agreeable to the nature of that country, chiefly a cattle-country, and the rent payable almost wholly in money.

Lastly,

Lastly, By your Lordships interlocutor, the stipend thereby modified is decerned "to be paid yearly to the pursuer, and his successors in office, ministers serving the cure at the said kirk, by Captain *John Gordon* of *Park*, and his successors in the right of the lands and teinds within the said parish." The petitioner apprehends, that this part of the interlocutor, must be varied at any rate. Were it to remain unaltered, it might thence be inferred that the whole modified stipend was payable by the petitioner alone; but this certainly was not your Lordships meaning. The Earl of *Findlater* and his predecessors have, for time past memory, paid part of the stipend of this parish, and, since the augmentation in 1717, they have always paid the sum of *L. 90 : 16 : 8* yearly, as their proportion of the stipend then augmented. And this sum, the petitioner apprehends, the Earl must in all events continue to pay.

But further, the petitioner is advised that the Earl of *Findlater* will be obliged to bear his proportion, if not the whole of the augmented stipend: It is very true, the Earl has neither lands or teinds within the parish; but nevertheless, as the petitioner is possessed of various contracts between the Earl's predecessors and his, with respect to the patronage and teinds of this parish, he is pretty certain of being able to show from these contracts, that the whole, or at least a proportion of this augmentation, must be localled upon the Earl of *Findlater*; or at least, that his Lordship will be ultimately liable in it. That question however is not *hujus loci*; but, in order to settle it, the petitioner would incline, that after the stipend is finally modified, your Lordships should

should remit to an Ordinary to settle the locality ; and this can be no loss whatever to the pursuer, because his augmentation takes place from the raising of his summons ; and after the modification, the petitioner is no doubt liable for the whole augmentation, till such time as all disputes that may arise in the locality are determined.

May it therefore please your Lordships, to alter your former interlocutor ; and to find that no augmentation can be demanded in this case. At any rate, 2do, To modify the stipend lower than by the former interlocutor. And 3tio, To ordain the stipend so modified to be payable in money only. And lastly, To remit to an Ordinary, to ascertain in what proportions the modified stipend is to be localled.

According to Justice, &c.

COSMO GORDON.

My further duty, according to Justice, is to say that the Earl of Portland will be obliged to bear the proportion, if not the whole, of the expense. It is very true, that the Earl has nothing lands or tithes within the parish; but nevertheless, as the parish is possessed of various contracts between the Earl's predecessors and his, with respect to the patronage and tithes of this parish, he is pretty certain of being able to find some means to contribute, that the whole, or at least a proportion of this augmentation, shall be localised upon the Earl of Portland; or at least, that his Lordship will be ultimately liable for it. That question however is not *happily* settled; but, in order to settle it, the petitioner would desire, that after the stipend is finally modified, your Lordships should